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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Writ Of Certiorari To
The Court Of Appeals Of Georgia

PETITIONER'S REPLY BRIEF

JAMES H. LOHR
428 McCallie Avenue
Chattanooga, TN 37402
(615) 756-5880
Court-appointed Counsel for Petitioner

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SUMMARY OF ARGUMENT

The Petitioner was in fact treated differently from other probationers who have sufficient money to pay their fines or restitution. This different treatment, which was based on the Petitioner's indigency, does not rationally advance any of the four legitimate state interests which are outlined in the Respondent's Brief. The failure of the State to show a rational relationship between the State's action and a legitimate state interest demonstrates a violation of the Equal Protection Clause even when the lowest level of judicial scrutiny is applied. However, greater judicial scrutiny is required in this case. If this Court should apply strict scrutiny or an intermediate level of scrutiny, it would appear that both parties would agree that the State's action cannot be upheld.

ARGUMENT

I.

Petitioner Received Different Treatment Because Of His Indigency.

The Respondent asserts that the Petitioner's complaint is not that he was treated differently, but that he should have been treated differently because of his indigency. Of course, whether an individual belongs to a class which is treated differently from other individuals depends upon how the classifications are drawn. It is true that the State of Georgia treats all individuals who have their probation conditioned upon the payment of a fine and restitution the same regardless of an individual's wealth or lack of wealth. All who do not pay are subject to having their probation revoked.

The Equal Protection Clause only requires that all individuals who are similarly situated be treated alike. *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920). To determine the proper description of a classification it must first be decided which individuals are similarly situated. A proper analysis would begin by looking at all individuals to whom a particular state law is applicable. In the present case, this Court should look to all probationers whose probation is con-

ditioned upon the payment of a fine or restitution. The laws of the State of Georgia discriminates and classifies those individuals. The State treats those who do not pay their fine differently from those who do pay.

As previously stated in the Petitioner's Brief, it is assumed that those who are able to pay a fine or restitution imposed as a condition of probation but willfully refuse to obey the order of the sentencing court may legitimately have their probation revoked. It is not suggested by the Petitioner that the discrimination against those individuals is unconstitutional or even undesirable. However, any rationale which may support the revocation of such an individual's probation may not automatically be applied in support of the revocation of an indigent's probation. The crux of the Petitioner's argument is that the class of individuals discriminated against by having their probation revoked in unconstitutionally overbroad and that the revocation of an indigent's probation for the failure to pay a fine or restitution must independently be subjected to analysis under the Equal Protection Clause.

II.

The Different Treatment Offered The Petitioner Did Not Rationally Further Any Legitimate State Interest.

The Respondent asserts the existence of four legitimate State interests which are furthered by the revocation of the Petitioner's probation. These interests can be summarized as follows: (1) the protection of society, (2) the rehabilitation of the petitioner, (3) the maintenance of public confidence in the criminal justice system, and (4) the collection of restitution for the victims of a crime. The Petitioner does not deny that any of the above interests are legitimate, but does deny that they were in any way advanced by the revocation of the Petitioner's probation.

The Respondent appears to first argue that *because* of the Petitioner's indigency, it was justified in revoking the Petitioner's probation for his failure to pay the fine and restitution. It is

suggested that the Petitioner's status as unemployed and his indigency made him a greater threat to society, and that by revoking his probation the State furthered its interest in protecting its citizens. The underlying premise of the argument is that one who becomes unemployed and indigent also becomes more likely to commit a crime. This premise is faulty. First, the Respondent refers to several studies which apparently demonstrate a statistical relationship between criminal activity and low economic status. The fallacy in the argument is that a statistical relationship is interpreted as a causal relationship. Just because a statistical relationship exists between two factors does not necessarily mean that one of the factors causes the other. There may very well exist factors in low socio-economic groups, which are not as prevalent in higher economic groups, that cause or tend to cause criminal activity. However, there is no proof that any such factors are brought into existence because of a lack of wealth. In other words, there is no proof that a lack of wealth causes criminal activity.

Secondly, statistical information does not provide any information about a specific member of a group. As the Respondent recognizes, the revocation of the Petitioner's probation resulted from an individualized state determination. *Respondent's Brief, page* 11. In the present case, there is nothing in the record to support a finding of fact supporting the conclusion that because the Petitioner became unemployed and indigent he also became a greater threat to society. The State of Georgia cannot rely on an unfounded assumption that the Petitioner's change in economic status caused a corresponding change in his propensity to commit criminal acts.

Even if we assume the validity of the Respondent's suggestion that the Petitioner's indigency increased his propensity to commit a crime, this alone is not sufficient to revoke his probation. The ground on which the Petitioner's probation was revoked was his failure to pay the fine and restitution. The Respondent does not, and could not, reasonably argue that the mere fact of non-payment created any threat to society. In-

stead, the Respondent argues that the failure to pay the fine and restitution is the direct result of his indigency which is evidence of an increased likelihood that the Petitioner would commit a criminal act. This chain of reasoning would suggest that the real ground for the revocation of the Petitioner's probation was not the failure to pay the fine and restitution, but is the alleged additional risks imposed upon society by the Petitioner's indigency. With respect to this position it need only be noted that the Petitioner's conditions of probation did not include a condition that he remain employed under all circumstances[1] and not become indigent, nor did they include a condition that his status not change so as to become statistically more likely to commit a criminal act. (J.A. 4,5,9,10). Probation cannot be revoked when there is no material violation of a condition of probation. *See*, OFFICIAL CODE OF GA. ANN. § 42-8-38 (Michie 1982), GA. CODE ANN. § 27-2713 (Harrison 1978). Furthermore, the State of Georgia does not allow the revocation of probation on a ground not stated in the Petition for Revocation. *Eg. Radcliff* v. *State*, 134 Ga. App. 244, 214 S.E.2d 179 (1975).

If the Respondent's reasoning is extended to its logical conclusion, any person who is on probation and becomes unemployed would be subject to having his probation revoked. In fact, any probationer who changed his status so as to become a member of any statistical group that has a higher crime rate would be subject to revocation. It is inconceivable that the Equal Protection Clause of the United States Constitution

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[1] OFFICIAL CODE OF GA. ANN. § 42-8-35(5) (Michie 1982), GA. CODE ANN. § 27-2711(5) (Harrison 1978), allows a court to require a probationer to "[w]ork faithfully at suitable employment insofar as may be possible." This was a condition of the Petitioner's Probation. (J.A. 4,5,9,10). However, there is no suggestion that the Petitioner could have avoided being laid off or could have obtained other suitable employment.

should allow decisions involving a person's liberties to be based upon statistical analysis.

The Respondent does not seriously argue that the revocation of the Petitioner's probation assisted in rehabilitation, except that when the Petitioner was placed in jail the State removed from the Petitioner the temptation to commit a further crime. It would seem reasonable to assume that all probationers have opportunity to commit a crime while on probation. If it is a legitimate rationale that the State may remove such temptations by imprisoning probationers, this would justify the revoking of any individual's probation at any time. In that event, probation would be no more than a gratuity given by the State which could be arbitrarily denied. However, probation is more than an act of grace. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

The Respondent next argues that if the Petitioner were allowed to use his indigency to escape the punishment imposed by the fine and restitution,[2] the public confidence in the criminal justice system would be damaged. In response it need only be noted that the State is not powerless to collect the fine and restitution, *Williams* v. *Illinois*, 399 U.S. 235,242 (1970), or to impose an alternate, equivalent punishment.[3] Furthermore, if

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[2] There is no suggestion that the Petitioner misrepresented his financial ability at the time he was sentenced to probation.

[3] Justice White's dissenting opinion in *Wood* v. *Georgia*, 450 U.S. 261 (1981), suggests that where an indigent cannot pay his fine, his probation may be revoked if the imprisonment imposed is an equivalent substitute for the fine. In the present case it is not clear that the Georgia First Offender Act would allow a partial revocation without an entry of an adjudication of guilt, although that possibility appears to be left open by statute. *See*, OFFICIAL CODE OF GA. ANN. § 42-8-60(b) (Michie 1982), GA. CODE ANN. § 27-2727 (Harrison 1978). If an adjudication of guilt is required before a Trial Court could order imprisonment in lieu of a fine, then for the reasons stated in the Petitioner's Brief, this alternative would not be available in the present case.

the State of Georgia is allowed to place individuals in jail solely because they are too poor to pay a fine or restitution, it would not take many such cases to destroy public confidence in the fairness of such a system. Finally, the State argues that although the revocation of the Petitioner's probation did not further the State's interest in the collection of the restitution and fine imposed in this case, in some way the revocation did advance the State's interest in the enforcement of restitution when the entire course of probation decisions are considered. For two reasons this argument is unpersuasive. First, probation revocation is an individualized decision and each such decision must separately be supported by a legitimate state interest. This, admittedly, is not accomplished in the present case. Secondly, the Petitioner only asserts that those who are totally unable to pay their fine or restitution are subject to invidious discrimination by the revocation of their probation for a failure to pay. Since this class is by definition unable to pay, whether or not the State revokes their probation will not change the fact that restitution will not be collected from this class of individuals.

III.

More Than A Rational Relationship Is Required To Uphold The State's Actions.

The foregoing discusses the secondary issue upon which the parties disagree. Specifically, the Respondent asserts that there exists a rational relationship between four legitimate state interests and the state's action in this case. The Petitioner denies the existence of a rational relationship and asserts that regardless of the standard of review used by this Court the State's action cannot be upheld. The parties also disagree regarding the threshold issue which involves the level of judicial scrutiny to which the State's action must be subjected. The Respondent does not argue that the State's action can withstand strict judicial scrutiny or even an intermediate level of scrutiny. It would appear that if this Court should decide that either of those two levels of review are appropriate, the Re-

spondent would concede that the State's action can not be upheld.

As previously argued in the Petitioner's Brief, the state action in this case operates to the disadvantage of a suspect classification as outlined in the two-prong test set forth in the case of *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). It was also argued that strict scrutiny should be applied because the State's action infringed upon the Petitioner's fundamental rights. In contrast, the Respondent states that any "effect on the petitioner's right to vote will result from his having committed burglary not from his inability to pay a fine and restitution." *Appellant's Brief, Page* 13. Although it is because he was adjudicated guilty of burglary that he has lost this fundamental right, that adjudication of guilt would not have occurred had he paid his fine and restitution. If the Petitioner was not indigent it must be assumed that the fine and restitution would have been paid and his probation would not have been revoked. In that event, Petitioner would not have been adjudicated guilty of a felony and lost his fundamental right to vote. Clearly, the Petitioner's indigency was the cause of the loss of his fundamental rights.

The Respondent distinguishes the case of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) on the ground that an intermediate appellant review addresses critical issues of whether or not there has been a correct adjudication of guilt. In contrast, it is asserted that a probation revocation does not involve the issue of guilt or innocence. Although this is true in most cases of probation revocation, the issue of guilt or innocence is very much involved in the present case. As previously stated, Petitioner's revocation carried with it an adjudication of guilt.

Although there is no statutory or constitutional right to Probation, once an individual is placed on probation he does acquire certain constitutional rights. As this Court stated: "It is clear at least after *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, 295 U.S. 490,492

(1935), that probation is an 'act of grace'." *Gagnon* v. *Scarpelli*, 411 U.S. 778,782 n.4 (1973). Since probation cannot be considered as an act of grace, actions which deprive petitioner of his probation must be required to stand the scrutiny of the Equal Protection Clause.

It is admitted that the cases of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), *Douglas* v. *California*, 372 U.S. 353 (1963), *Williams* v. *Illinois*, 399 U.S. 235 (1970), *Tate* v. *Short*, 401 U.S. 395 (1971) and other cases involving the rights of indigents in the criminal process, did not specifically address the issue of what level of judicial scrutiny was afforded the state actions. However, in footnote 14, in the case of *Plyer* v. *Doe*, ____ U.S. ____, 102 S.Ct. 2382 (1982), the Court recognized several situations which have traditionally invoked a high level of scrutiny. Classifications have been considered suspect where state actions were based on prejudice and persons were not judged individually, where state actions were irrelevant to the achievement of any proper legislative goal, where certain groups have historically been politically powerless, and where a disability was imposed upon a group by circumstances beyond their control. In the present case, Petitioner's revocation was not based upon any personal judgment relating to him except that he was too poor to pay. The revocation of his probation appears to be totally irrelevant to any proper legislative goal. Those who are indigent experience a certain lack of political power. This Court has for over two decades recognized that indigents who are subjected to proceedings before criminal courts must be provided some extraordinary protection. Finally, when a person becomes unemployed and is without funds this is quite often due to circumstances beyond that individual's control. These basic considerations would suggest that the proper construction to give to the prior cases of this Court requires strict judicial scrutiny of the State's rationale for revoking the Petitioner's probation.

In the alternative, Petitioner has asserted that an intermediate level of scrutiny should be applied. The cases of this Court have for a period of time established that indigents in the

criminal process are entitled to certain basic rights. It appears that the determination that indigents in the criminal process are to be given certain preferences is based on well-settled constitutional principles which have been sufficiently established to give them roots throughout the community over a significant period of time. In such situations this Court will apply at least an intermediate standard of review to determine the rationality of the governmental action. *See, Plyer* v. *Doe*, U.S. 102 S.Ct. 2382 n. 16 (1982).

CONCLUSION

For the above reasons the Petitioner respectfully disagrees with arguments presented in the Respondent's Brief.

Respectfully submitted,

HATFIELD, MCCOLPIN,
VAN CLEAVE & STULCE

BY: JAMES H. LOHR
James H. Lohr
428 McCallie Avenue
Chattanooga, TN 37402
(615) 756-5880
Court-appointed Counsel for Petitioner